

BRITISH STATUTES IN AMERICAN JURISDICTIONS

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The abstraction called the Law is a magic mirror wherein we see reflected not only our own lives, but the lives of all men that have been.—Attributed to Mr. Justice Holmes.

It has been said that man differs from other animals chiefly in this: that he retains in each generation that which has been handed down by its predecessor, and, after applying the touchstone of experience, passes it to his successors. This commonplace has been phrased in the folk saying, "Experience is the best teacher", and in the legal aphorism that "the life of the law has been experience". An outstanding characteristic of the founding of this republic was the tenacity with which our forefathers clung to their inheritance of the laws which their immigrant ancestors brought into the New World and adapted to the requirements of changed environment. John Adams is credited with the statement that he would not have taken the stand that he did in the War for Independence, if such action had involved the loss of the common law. Chief Justice Taft says, "We embodied in the Bill of Rights in our Constitution the principles of the British Constitution as they had been established at the Common Law."¹

At the threshold of the Revolution the American Continental Congress of 1774, under the presidency of George Washington, adopted this resolution:

"Resolved, N. C. D. 5. That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law.

*"Resolved, 6. That they are entitled to the benefit of such of the English statutes, as existed at the time of their colonization; and which they have, by experience, respectively found to be applicable to their several local and other circumstances."*²

¹ Foreword to JONES, AMERICAN MEMBERS OF THE INNS OF COURT (1924).

² 1 JOURNALS OF CONGRESS (1800) 28.

In a speech delivered in an early Virginia state convention, James Madison based his arguments upon Blackstone's *Commentaries* and asserted that all of the delegates were familiar with that work.³ Two of the states which ratified our Federal Constitution retained their royal charters for years after the signing of the Declaration of Independence.⁴ Their citizens were practical men, who felt satisfied with their time-tested autonomous legal and political systems. Equally practical were the citizens of the other states who joined in the conversion of the loose alliance, known as the Confederation, into the Federal Republic, for they indulged in no subversive jural theories, but "carried on" under their pre-war systems of jurisprudence.

There are probably few phrases in legal terminology which have more connotations than "common law". No attempt will be made to define the expression, but a few observations are offered as to some of its many applications. Sometimes it is applied to the Anglo-American system, as opposed to the Roman or civil law system. Again, it has been applied to the system originally enforced by the courts of King's Bench, Common Pleas, and Exchequer, as distinguished from that of the High Court of Chancery. At other times it connotes judiciary law—*lex non scripta*—in contradistinction to statutory enactment. As frequently employed in American states, the term "common law" comprises all laws enforced in courts of general jurisdiction, other than the enactments of the state from which such courts hold their commissions, and thus includes the statutes (colonial, territorial, English or state) of a parent jurisdiction. In a majority of the states of the Union a number of British statutes are now part of the local common law; just as much so as many passages of the *Corpus Juris* are part of the common law of Scotland, which, like some other jurisdictions which never were under the sway of the Roman Empire, has "received" much Roman law.

It has been stated frequently that the British statutes still extant in this country were brought over by the early settlers,

³ An edition of Blackstone's *Commentaries* was printed in America as early as the year 1771.

⁴ These states were Connecticut and Rhode Island. See FISKE, *THE CRITICAL PERIOD OF AMERICAN HISTORY* (1888) 65.

and that they survive because they have never been repealed. With all due respect for the great names of some of those who have attributed the survival of such statutes to tacit acquiescence, it is believed that local statutory enactments constitute overt legal authority for most cases wherein such overseas statutes have been cited. Expediency and convenience, almost amounting to urgent necessity, must have been potent factors in the survival of ancient legislation. This may be readily conceded if one recalls that the progress of judiciary law is by analogy to what is already settled⁵—"interstitial", as it is frequently described. In many American jurisdictions vast gaps would appear in the law, were one to disentangle and discard all that has developed from old enactments, and nowhere does this feeling manifest itself more strongly than in some western jurisdictions, which may roughly be classed as members of the Pacific Coast and Rocky Mountain group. Thus, the courts of Nevada have decided that a statutory recognition of "the common law of England"⁶ includes the English or British statutes in improvement thereof, which were passed prior to the Declaration of Independence,⁷ and that the statute of 32 Henry VIII, Chapter 34 (1542), permitting grantees of reversions and their privies in estate to take advantage of breaches of condition, is in force.⁸ Likewise, the statute of 10 & 11 William III, Chapter 17 (1699), declaring all lotteries to be a nuisance, has been held part of the common law of Nevada.⁹ There appears to be no compilation of British statutes in force in Nevada, and the local courts seem to have relied upon such sources as Kent and Blackstone.

The Arizona courts construe the "common law of England"¹⁰ to include English statutes such as the statute of 13 Edward I,

⁵ The Schooner Exchange v. McFaddon, 11 U. S. 116, 136 (1812); Hodges v. New England Screw Co., 1 R. I. 312, 356 (1850); Jacob v. State, 22 Tenn. 493, 515 (1842). This principle seems to be at the basis of the maxim *pari ratione, eadem est lex*.

⁶ ACT OF OCT. 30, 1861, c. I, § 1, COMP. LAWS OF NEV. (Cutting, 1900) § 3095.

⁷ See cases cited *infra* notes 8 and 9.

⁸ Hamilton v. Kneeland, 1 Nev. 40, 57 (1865).

⁹ *Ex parte* Blanchard, 9 Nev. 101, 105 (1874).

¹⁰ ACT OF NOV. 10, 1864, COMP. LAWS OF ARIZ. (1877) 571, Ariz. Sess. Laws 1885, No. 68; Luhrs v. Hancock, 6 Ariz. 340, 345, 57 Pac. 605, 606 (1899).

Chapter 34 (1285), providing that adultery accompanied by elopement and uncondoned by the husband operates to bar the right of dower.¹¹ While no specific limitation as to the date of accepted acts of Parliament appears to be laid down in Arizona, the courts have indicated that they will recognize the rules of such English statutes as are generally in force in American states either as part of the common law or as statutory enactments,¹² and the general trend seems towards the position that amendatory British statutes enacted prior to the Declaration of Independence form part of the common law of Arizona.

The neighboring state of California is another jurisdiction which interprets the phrase "common law of England" ¹³ as including some modificatory statutes. In accordance with this view the Supreme Court of California, in the case of *Martin v. Superior Court*,¹⁴ recognized the doctrine of the statute of 11 Henry VIII, Chapter 12 (1519), enacted to help and speed poor persons in their suits, saying:

"It would be strange, indeed, if our legislature should have designed to limit the applicability of the Code section [Political Code, §4468] to the ancient and frequently most barbarous rules and customs of the common law, and in so doing refuse to take into account the mitigation of their harshness and the broadening of the rules themselves which followed the successive enactments of the English statutes." ¹⁵

This recognition of acts of Parliament as rules of decision has not been mechanical, for local conditions and institutions have had considerable influence in the determination of what English law, whether judiciary or statutory, has been deemed applicable

¹¹ *Pendleton v. Brown*, 25 Ariz. 604, 613, 221 Pac. 213, 216 (1924).

¹² *Ibid.*

¹³ ACT OF APRIL 13, 1850, CAL. COMP. LAWS (Garfield & Snyder, 1853) 186; *Lux v. Haggin*, 69 Cal. 255, 379, 10 Pac. 674, 746 (1886); *Norris v. Moody*, 84 Cal. 143, 24 Pac. 37 (1890).

¹⁴ 176 Cal. 289, 293, 168 Pac. 135, 136 (1917).

¹⁵ Compare HALE, HISTORY OF THE COMMON LAW (3d ed. 1739) 162, ". . . the Statutes of *Westminster* 1, and *Westminster* 2. *Gloucester* and *Westminster* 3, and of *Articuli super Chartas*, . . . are now as it were incorporated into, and become a Part of the Common Law itself."

and therefore adopted. Hence the Statute of Enrollments¹⁶ and the Statute of Uses¹⁷ have never been in force in California, and the same position has been taken with regard to the statute of 43 Elizabeth, Chapter 4 (1600), respecting charities.¹⁸

The development of law in the Territory of Hawaii has an interesting bearing on the general subject of this article. In 1847 the old Kingdom of Hawaii inaugurated an eclectic system, by authorizing its courts to adopt the principles of the common law or the civil law, when founded in justice and not contrary to Hawaiian law or usage.¹⁹ This did not introduce the common law *eo nomine*, nor as a whole,²⁰ but the authority to borrow from that system evidently was construed to include British statutes, for the Statute of Uses was recognized as early as 1855.²¹ In 1892 the common law of England, "as ascertained by English and American decisions", was declared to be the common law of Hawaii, saving, *inter alia*, "laws . . . fixed by Hawaiian judicial precedent, or established by Hawaiian usage".²² While it has been decided that statutes enacted during the reign of George IV and Victoria are too recent to be regarded as part of the local common law,²³ the question of the chronological line of division seems to be open. It is probable that a line would be drawn so as to include some statutes enacted in the reign of George III, as in the case of Florida²⁴ and some other jurisdictions.

Oregon is another jurisdiction which interprets "common law" as including British statutes. That system was introduced by popular vote on July 26, 1845, by Section 2, Article 1, of the Organic Law of the provisional government of Oregon; was continued in effect by Act of Congress, of August 15, 1848; and was

¹⁶ 27 HEN. VIII, c. 16 (1535). See *Chandler v. Chandler*, 55 Cal. 267, 271 (1880).

¹⁷ 27 HEN. VIII, c. 10 (1535). See *Estate of Fair*, 132 Cal. 523, 535 (1901).

¹⁸ *Estate of Hinckly*, 58 Cal. 457, 490 (1881).

¹⁹ HAWAII LAWS (1847) 5, HAWAII CIVIL CODE (1859) §§ 14, 823.

²⁰ *Kake v. Horton*, 2 Hawaii 209 (1860).

²¹ *Hawaiian Trust & Investment Co. v. Barton*, 16 Hawaii 294, 303 (1904).

²² HAWAII LAWS (1892) c. 57, § 5; 1 HAWAII REV. LAWS (1925) 146; *Hall v. Kennedy*, 27 Hawaii 626 (1923).

²³ *In re Craig*, 20 Hawaii 447 (1911).

²⁴ *Infra* note 127.

ratified as a part of "all laws in force continued in force", by Section 7, Article 18, of the Oregon Constitution of September 18, 1857.²⁵ It has been decided that the common law of Oregon is the common law of England, modified and amended by English statutes, as it existed at the time of the Revolution;²⁶ and, in accordance with this interpretation, the statute of 11 George II, Chapter 19, Section 15 (1737), providing that rent is apportionable where a lessor having only an estate for life dies before the day upon which such rent would have become payable, is in force in Oregon.²⁷

The daughter state of Washington traces its common law to its code of 1881, enacting that "The common law of England . . . shall be the rule of decision".²⁸ By judicial construction this includes modificatory and amendatory statutes, as in the case of *Allen v. Kane*,²⁹ wherein it was decided that the statute of 13 Elizabeth, Chapter 5 (1570), anent fraudulent conveyances, is part of the common law of the state. In this the state court differs from that of the old parent Territory of Oregon, which, like many other jurisdictions, has decided that the statute of 13 Elizabeth, Chapter 5 (1570), was merely declaratory of the common law;³⁰ but the case is important in settling that pertinent acts of Parliament, in improvement of the common law, are part of the local common law. It is surmised that useful British statutes enacted prior to the Declaration of Independence, whenever found to be applicable to local conditions, will be deemed part of the common law of Washington, when the question is properly presented. In all probability the courts of the Territory of Alaska (which region was governed at one time under such written and unwritten laws of Oregon as were applicable to local conditions) will eventually decide the common law of that jurisdiction to be the common law of England as modified by English statutes prior to

²⁵ United States Fid. & G. Co. v. Bramwell, 108 Ore. 261, 217 Pac. 232 (1923).

²⁶ Peery v. Fletcher, 93 Ore. 43, 182 Pac. 143 (1919); United States Fid. & G. Co. v. Bramwell, *supra* note 25.

²⁷ Peery v. Fletcher, *supra* note 26.

²⁸ CODE OF WASH. (1881) c. I, § 1.

²⁹ 79 Wash. 248, 140 Pac. 534 (1914).

³⁰ Monroe v. Hussey, 1 Ore. 188 (1855).

the Revolutionary War, for one division of the District Court of Alaska, in the case of *Valentine v. Roberts*,³¹ discusses the statute of 29 Charles II, Chapter 7, Section 6 (1677), prohibiting arrests on Sunday except for treason, felony, and breach of the peace, as part of the local law; and another division of the same court held, a year later, in the case of *In re Burkell*,³² that the statute of 13 George III, Chapter 38 (1773), making dog-stealing larceny, is in force as part of the common law of Alaska. The later-enacted Civil Code, which recognizes the common law as being in force,³³ and the contemporary Criminal Code,³⁴ which includes the common law of England as adopted and understood in the United States, point to the adoption of the Oregon and Nevada rule, previously laid down in the case of *In re Burkell*.³⁵

No indexes seem to refer to any British statutes as being in force in Idaho. This is not conclusive, for it is frequently the case in other jurisdictions that useful rules of decision are found in the reports, which are not covered by official syllabi, and, as a matter of personal observation, many British statutes have been found, in the course of preparing this article, which are not indexed at all. The Idaho statute,³⁶ which recognizes as part of its legal system "the common law of England", is similar to those of California³⁷ and Nevada,³⁸ which, as already stated, construe the phrase "common law of England" as including pertinent British statutes. The substantial identity of the Idaho common law statute with that of Nevada has received local judicial recognition,³⁹ and, should the occasion arise, a similar interpretation may be

³¹ 1 Alaska 536, 546 (1902).

³² 2 Alaska 108, 119 (1903).

³³ ALASKA COMP. LAWS (1913) § 796.

³⁴ *Ibid.* § 2099.

³⁵ It may be interesting to note that, with the exception of Louisiana and Iowa, such trans-Allegheny American jurisdictions as have formulated definite rules about acts of Parliament may be divided into three classes: (1) those which utterly exclude them; (2) those which draw the line at the year 4 JAC. I; (3) those which include enactments prior to July 4, 1776.

³⁶ IDAHO COMP. STAT. (1919) § 9460.

³⁷ CAL. POL. CODE (1872) § 4468.

³⁸ *Supra* note 6.

³⁹ *Northern Pacific Ry. v. Hirzel*, 29 Idaho 438, 454, 161 Pac. 854, 858 (1916).

expected. Indirectly, it might be argued that the statute of 13 Elizabeth, Chapter 5 (1570), directed against fraudulent conveyances, has been implicitly recognized as part of the common law of Idaho, by reason of an unequivocal citation from Ruling Case law;⁴⁰ but, as many courts hold that that statute was merely declaratory of the common law, the point is debatable.⁴¹

Whether English statutes modificatory of the common law may be considered a repository from which to fill gaps in the jurisprudence of Utah is speculative, if one considers the decisions. One of the earliest reported decisions takes the ground that the people:

"have tacitly agreed upon maxims and principles of the Common Law suited to their conditions and consistent with the Constitution and Laws of the United States, and they only wait recognition by the courts to become the Common Law of the Territory. When so recognized, they are laws as certainly as if expressed by the law-making power".⁴²

Another early decision⁴³ takes the position that:

"Although the Common Law has not been adopted in this Territory by any Statute, we entertain no doubt that it should be regarded as prevailing here, so far as it is not incompatible with our situation and government, and that it is to be resorted to as furnishing to that extent the measure of personal rights and the rule of judicial decision."

In the case of *Mormon Church v. United States*,⁴⁴ it was held that the Organic Act, of September 9, 1850, introduced the general system of common law as it prevails in this country. The case of *Schenck v. Wicke*⁴⁵ leans towards regarding the Statute of Uses as part of the common law, but, fourteen years later, there appears a dictum, in the case of *Hatch v. Hatch*,⁴⁶ to the

⁴⁰ 12 R. C. L. 491 (1916). See *McMillan v. McMillan*, 42 Idaho 270, 274, 245 Pac. 98, 99 (1926).

⁴¹ 4 KENT, COMMENTARIES (3d ed. 1836) 462.

⁴² *First National Bank v. Kinner*, 1 Utah 100, 107 (1873).

⁴³ *Thomas v. Union Pacific R. R.*, 1 Utah 232, 234 (1875).

⁴⁴ 136 U. S. 1, 62, 10 Sup. Ct. 792, 809 (1889).

⁴⁵ 23 Utah 576, 65 Pac. 732 (1901).

⁴⁶ 46 Utah 116, 121, 148 Pac. 1096, 1098 (1915).

effect that English statutes form no part of the common law of Utah.

The more youthful State of New Mexico, under a statute providing that the common law, as recognized in the United States of America, shall be the rule of practice and decision,⁴⁷ is much clearer and more positive as to the extent of its local common law than the senior jurisdiction of Utah, which is due, no doubt, to the accidents of litigation. Thus the provision of the Statute of Limitations,⁴⁸ authorizing an action of account by one tenant in common against another,⁴⁹ and the statute of 9 Anne, Chapter 20 (1710), relating to information in the nature of *quo warranto*,⁵⁰ are recognized as part of the local common law, under enactments phrased in language similar to that employed in some of the Utah decisions.⁵¹ Nebraska, Michigan, Ohio, Mississippi and Texas place a different interpretation upon the phrase "common law" than do the Pacific coast jurisdictions, as all of them exclude acts of Parliament.

Many Americans are so in the habit of saying that the United States does not know how to administer colonies and has had no colonial experience, that few stop to consider that our first colonial legislation antedates the going into effect of our Federal Constitution. They also fail to observe that, magnificent as has been the work of many American physicians and engineers who have permanently stamped out pestilence and removed many obstacles to a healthful and happy existence, work in the overseas possessions is frequently hampered by the absence of a coördinating colonial civil service. The first American colonial statute, familiarly designated in schoolbooks as the Ordinance of the Northwest Territory, was enacted by the Congress of the Confederation in the same year that the Constitutional Convention was held. It was copied from time to time for about a generation. Unhappily the author-

⁴⁷ ACT OF JAN. 7, 1876, N. M. ANN. STAT. (1915) § 1354.

⁴⁸ 21 JAC. I, c. 16 (1623). See *Browning v. Estate of Browning*, 3 N. M. 371, 9 Pac. 677 (1886).

⁴⁹ *Armijo v. Neher*, 11 N. M. 645, 72 Pac. 12 (1903).

⁵⁰ *Albright v. Territory*, 13 N. M. 64, 79 Pac. 719 (1905).

⁵¹ *Bank v. Kinnon*, 1 Utah 100, 107 (1873); *Thomas v. Union Pacific Ry.*, 1 Utah 232 (1875).

ship of this historic statute is a matter of controversy. The Ordinance of July 13, 1787, for the Territory of the United States Northwest of the Ohio River (since subdivided into the states of Ohio, Indiana, Illinois, Michigan and Wisconsin), provided, among other measures, that the governor and judges should have the power of introducing such laws of the original states as they might deem necessary and suitable.⁵² Under the primitive conditions of the frontier such laws were published by writing them out in longhand and posting them where they were likely to be seen by the largest number of people. Among these statutes was Law 176, copied from a repealed Virginia statute, introducing the common law together with applicable English statutes which had been enacted prior to the fourth year of the reign of James I. This act was published July 14, 1795, and became effective October 1, 1795.⁵³ During part of the territorial period, and for a short while under state government, English statutes not inapplicable to local conditions, and enacted prior to the fourth year of the reign of James I, were in force in Ohio,⁵⁴ but since June 1, 1805, no English statute has been in force in Ohio as part of the common law or otherwise. This fact explains the decision in the case of *Thompson v. Thompson*,⁵⁵ that the Statute of Uses is not in force in Ohio. Michigan, which at one time was subject to the *Coutume de Paris*, as common law, has decided that, never having been an English colony, English statutes have never been effective in her territory, and that her common law includes no such statutes.⁵⁶

The state of Mississippi is another jurisdiction which declines to include British statutes as part of the common law. In the organization of the original territory the fundamental law was copied from that of the old Northwest Territory,⁵⁷ with the exception of the vague antislavery clause, and thereunder the com-

⁵² 2 THORPE, CONSTITUTIONS AND CHARTERS (1909) 957, 958.

⁵³ 1 CHASE, STATUTES OF OHIO (1833) 190.

⁵⁴ *Ibid.* 190, 512; *Hastings v. Columbus*, 42 Ohio St. 585, 590 (1885).

⁵⁵ 17 Ohio St. 649 (1867).

⁵⁶ *Trask v. Green*, 9 Mich. 358 (1861); *Matter of Lamphere*, 61 Mich. 105, 27 N. W. 882 (1886).

⁵⁷ ACT OF APRIL 7, 1798; 4 THORPE, *op. cit. supra* note 52, at 2025.

mon law was introduced.⁵⁸ It was decided in *Boarman v. Catlett*⁵⁹ that:

"no English statute has any intrinsic validity here [in Mississippi]. When the Mississippi territory was organized, the ordinance secured the inhabitants in the enjoyment of judicial proceedings, according to the course of the common law. Toulmin, Dig. 473; Laws U. S., Vol. 1, 475. This, together with the provision in the constitution of 1817, schedule §5, has been considered to exclude all English statutes, and to adopt only the common law. . . ."

The daughter state of Alabama takes a divergent view of the meaning of the ordinance of April 7, 1798.⁶⁰

Texas, while an independent republic, introduced the common law as the rule of decision "in all criminal cases", by Section 13, Article IV of her constitution, and, at the same time, directed the congress to "introduce by law the common law of England, with such modifications" as circumstances might require.⁶¹ The Texas Congress, by an act of January 20, 1840, introduced the common law of England,⁶² but did not adopt any English statute in aid of that system,⁶³ and only adopted the system as "the rule of decision", and not as a rule of practice.⁶⁴

Nebraska's adoption of the common law of England has been held not only to exclude English statutes, but also to exclude the common law of England as modified by the same. Thus the Statute of Uses is not law in Nebraska, for the stated reason that the term "common law of England" does not include English statutes nor signify the common law of England as modified by the same.⁶⁵ It is submitted, with considerable diffidence, that the *doctrines* of British statutes which have been held with more or

⁵⁸ *Morgan v. Reading*, 3 S. & M. 366, 398 (Miss. 1844).

⁵⁹ 21 Miss. 149, 152 (1849).

⁶⁰ *Garret v. Lynch*, 44 Ala. 324, 327 (1870).

⁶¹ *PASCHAL'S DIGEST* (1878) § 13, n. 138.

⁶² *Courand v. Vollmer*, 31 Tex. 397 (1868).

⁶³ *Paul v. Ball*, 31 Tex. 10 (1868), citing *PASCHAL'S DIGEST* (1878) ART. 978, n. 418.

⁶⁴ *Courand v. Vollmer*, *supra* note 62, at 399.

⁶⁵ *Farmers & Merchants Ins. Co. v. Jensen*, 58 Neb. 522, 530, 78 N. W. 1054, 1056 (1899).

less frequency in some jurisdictions to be declaratory of the common law, may be considered law in some of the states just mentioned as rejecting English statutes, if needed at any time to fill gaps in local law, even where the same doctrines have been assumed to be of a statutory origin in other jurisdictions.

Whether there are other American jurisdictions which will definitely reject British statutes is conjectural. There may be decisions to that effect which have eluded search, or some may be in the course of publication while these lines are being written. Montana lays such heavy stress upon the local codes and statutes, as opposed to the common law, as to render it probable that few, if any, acts of Parliament would receive judicial recognition as part of the local law.⁶⁶ The phrase "common law of England", contained in the local statute,⁶⁷ is susceptible of the rigid interpretation given it by Nebraska and Texas, or of the more elastic construction placed upon it by Wisconsin and Nevada. Justice Galen, in the case of *Gas Products Co. v. Rankin*,⁶⁸ gives the following definition of common law, which closely parallels that of New Mexico⁶⁹ (whose interpretation includes reformatory British statutes) :

"The common law has been a part of our system of jurisprudence from the organization of Montana territory to the present day. (*State ex rel. Ford v. Young*, 54 Mont. 401, 403, 170 Pac. 947.) The common law of England means that body of jurisprudence as applied and modified by the courts of this country up to the time it became a rule of decision in this commonwealth. (*Aetna Accident Liability Co. v. Miller*, 54 Mont. 377, 382, L. R. A. 1918C, 954, 170 Pac. 760.)"

A California enactment, identical in language with Section 5672 of the Montana code, has been held to include modificatory British statutes.⁷⁰

⁶⁶ *Decker v. Decker*, 56 Mont. 338, 345, 185 Pac. 168, 170 (1919) ; *In re Connolly Estate*, 73 Mont. 35, 58, 235 Pac. 408, 418 (1925).

⁶⁷ MONT. REV. CODES (12 Choate, 1921) § 5672.

⁶⁸ 63 Mont. 372, 389, 207 Pac. 993, 997 (1922).

⁶⁹ *Ex parte De Vore*, 18 N. M. 246, 256, 136 Pac. 47, 50 (1913).

⁷⁰ *Martin v. Superior Court*, 176 Cal. 289, 292, 168 Pac. 135, 136 (1917).

It is also doubtful whether there be any British acts of Parliament which would be recognized as part of the law of North Dakota or South Dakota. A careful scrutiny of the indexes of the North Dakota and South Dakota reports fails to bring to light any satisfactorily definite ruling on acts of Parliament. This may be due to the haphazardness of litigation. The North Dakota case of *Pratt v. Pratt* ⁷¹ defines the common law as containing no statute of limitations, a proposition which goes far towards establishing the principle that no British statutes form part of the common law of North Dakota; but an early decision in Maryland ⁷² made a similar ruling by deciding that the Statute of Limitations did not extend to the province, although passed prior to the first settlement, and yet numerous subsequent decisions have established that Maryland, like most American jurisdictions, has adopted much British statute law.⁷³ The statutory sanction of common law of the parent territory of Dakota,⁷⁴ as well as those of North Dakota ⁷⁵ and South Dakota,⁷⁶ are alike in enacting that "The evidence of the common law . . . is found in the decisions of the tribunals"—language broad enough to leave their interpretation to the untrammelled discretion of the local courts. In the light of such a provision, a strong argument might be based upon any one of three theses: (1) that no British statutes are included, as in Texas and a few other states; (2) that pre-independence statutes are included, as in California and many other states; or (3) that statutes prior to the settlement of Jamestown are included, as in Kentucky and many other states. The first thesis could be supported by the literal argument of Texas, Nebraska and Mississippi, or the historical argument of Michigan. The second proposition could be supported by the reasoning of the Oregon courts. The third hypothesis could be supported, in part, by striking a general average of the American common law. All of this is admittedly vague,

⁷¹ 29 N. D. 531, 536, 151 N. W. 294, 295 (1915).

⁷² *Lloyd's Lessee v. Hemsley*, 1 H. & McH. 28 (Md. 1712).

⁷³ ALEXANDER, *BRITISH STATUTES IN FORCE IN MARYLAND* (Coe's ed. 1912).

⁷⁴ REV. CODE OF DAKOTA (1880) 207, § 5; COMP. LAWS OF DAKOTA (1887) § 2504.

⁷⁵ N. D. COMP. LAWS ANN. (1913) § 4330.

⁷⁶ S. D. REV. CODE (1919) § 3.

but courts decide questions only when and as they arise. Probably everyone who has had any judicial experience has had occasion to observe fruitless attempts to obtain rulings upon doubtful questions of law, which efforts have failed because the accidents of litigation have injected a turning-point precluding consideration of points rendered irrelevant. It is most likely that the question of the effect to be given to acts of Parliament, when squarely presented to the courts of North Dakota and South Dakota, will be solved by considerations of public policy, necessity, and adaptability to local jurisprudence and institutions. The problem makes one feel the force of the English barristers' aphorism, "an ounce of precedent is worth a pound of principle".

Oklahoma is another jurisdiction whose position on the subject of acts of Parliament is difficult to ascertain. The Congress of the United States,⁷⁷ on May 2, 1890, introduced chapter 20 of Mansfield's *Digest of the Laws of Arkansas*, Section 556 of which recognizes "the common law of England . . . and all statutes of the British parliament in aid of or to supply the defects of the common law made prior to the fourth year of James I", as the law of the eastern section of the present state of Oklahoma, at that time a separate jurisdiction under the name of Indian Territory.⁷⁸ In the same act Congress introduced into the remaining portion of the present Oklahoma, then known as Oklahoma Territory, chapter 15 "of the Compiled Laws of the State of Nebraska, in force November first, eighteen hundred and eighty-nine, . . . until after the adjournment of the first session of the legislative assembly . . .",⁷⁹ thereby temporarily introducing the common law of Nebraska, which, as previously noted, excludes all acts of Parliament. The present statute on the subject of local common law recognizes "the common law, as modified by constitutional and statutory law, judicial decisions and the conditions and wants of the people".⁸⁰ This is identical

⁷⁷ 26 STAT. 94, § 31 (1890).

⁷⁸ *Carter v. U. S.*, 1 Indian Ter. 342, 351 (1896); *Painter v. U. S.*, 6 Indian Ter. 505, 98 S. W. 352 (1906).

⁷⁹ 26 STAT. 87, § 11 (1890); 5 THORPE, *op. cit. supra* note 52, at 2946.

⁸⁰ OKLA. COMP. STAT. ANN. (1921) § 170.

in text with the Kansas statute,⁸¹ and Kansas, like Arkansas, recognizes statutes of the British Parliament enacted prior to the fourth year of James I. Like Kansas, and unlike New Mexico and Massachusetts, Oklahoma has no common law crimes,⁸² and hence no British statute could be cited as authority for declaring an offence to be a crime. It is fairly well settled that no act of Parliament subsequent to the settlement of Jamestown would be recognized as part of the local law.⁸³ There are numerous dicta which would support the argument that useful acts of Parliament, prior in date to the settlement of Virginia (the first territory in the American hemisphere to receive representative government), are cognizable as part of the law of Oklahoma.⁸⁴ In addition, the established judicial formula that the rules of the common law are such as are recognized and promulgated by the American courts,⁸⁵ and the case of *Evans v. Willis, County Judge*,⁸⁶ following the line of demarcation of an Alabama decision,⁸⁷ point towards acquiescence in the view of Mr. Justice Story,⁸⁸ that statutes passed before the emigration of our ancestors, applicable to our situation and in amendment of the law, constitute a part of our common law. A word of caution, however. A decision concededly correct in its results is not, for that reason alone, to be taken as a complete statement of an abstract proposition, without limitation or restriction, when applied to a case differing in its state of facts,⁸⁹ nor is a case necessarily binding or persuasive authority for a proposition which appears to follow logically from it.⁹⁰

⁸¹ KAN. REV. STAT. ANN. (1923) 77-109.

⁸² *Prince v. U. S.*, 3 Okla. Crim. 700, 109 Pac. 241 (1910).

⁸³ *McKennon v. Winn*, 1 Okla. 327, 333 (1893); *Evans v. Willis*, 22 Okla. 310, 97 Pac. 1047 (1908); *Painter v. U. S.*, *supra* note 78.

⁸⁴ *Cf.* cases cited *supra* note 83.

⁸⁵ *McKennon v. Winn*, *supra* note 83; *Hoppe Hardware Co. v. Bain*, 21 Okla. 177, 95 Pac. 765 (1908); *Maxwell v. Gillespey, Sheriff*, 116 Okla. 68, 243 Pac. 497 (1925) *semble*.

⁸⁶ 22 Okla. 310, 97 Pac. 1047 (1908).

⁸⁷ *State v. Moore*, 19 Ala. 514, 519 (1851).

⁸⁸ *Patterson v. Winn*, 30 U. S. 233, 241 (1831).

⁸⁹ *Holcomb v. Bonnel*, 32 Mich. 6 (1875); *Quinn v. Leathem*, [1901] A. C. 495.

⁹⁰ *Quinn v. Leathem*, *supra* note 89; HOLMES, THE COMMON LAW (1881) 36.

A very large group of states recognizes amendatory English statutes prior to the fourth year of James I; in other words, in force at the time of the landing of the first English-speaking settlers in what is now the United States. The prototype of such law was enacted by the Virginia convention of May, 1776, which declared the separation from British rule, framed the first constitution of the state, and ordained that "the common law of England, all statutes or acts of Parliament made in aid of the common law prior to the fourth year of the reign of King James the First and which are of a general nature not local to that kingdom" should be rules of decision.⁹¹ The Virginia legislature, in 1792, repealed statutes and acts of the Parliament of Great Britain hitherto in force, saving and excepting writs remedial and judicial enacted prior to the fourth year of James I.⁹² This repealing act recited that all British statutes embodying substantive law deemed worthy of adoption had been specifically enacted. The exception of remedies and judicial writs is still law in Virginia⁹³ and in West Virginia; the latter state deriving the law from Virginia.⁹⁴ It is thus that the statute of 2 & 3 Edward VI, Chapter 24 (1548), giving jurisdiction to the place of death in homicide cases where the blow was delivered in one jurisdiction and death ensued in another, has been determined to be part of the common law of West Virginia.⁹⁵ As previously stated, the repealed act of Virginia recognizing acts of Parliament was introduced by the governor and judges of the original Northwest Territory in 1795; and, as already noted, Ohio repealed this at a very early date, and Michigan decided that it had never applied. Illinois practically reenacted the said statute,⁹⁶ so that, with three

⁹¹ Passed July 3, 1776. I REV. CODE OF 1819 (Va.) 135; *Foster v. Commonwealth*, 96 Va. 306, 31 S. E. 503 (1898).

⁹² ACT OF DEC. 27, 1792, VA. CODE ANN. (1924) § 3; *Dykes v. Woodhouse*, 24 Va. 287, 291 (1825); *Gallego's Ex'rs v. The Attorney General*, 30 Va. 450, 476 (1832); *Foster v. Commonwealth*, *supra* note 91.

⁹³ VA. CODE (1860) 112.

⁹⁴ CONSTITUTION OF W. VA. (1872) ART. 8, § 21; W. Va. Acts 1882, c. 1143.

⁹⁵ *Ex parte McNeely*, 36 W. Va. 84, 14 S. E. 436 (1892).

⁹⁶ ACT OF GEN. ASSEMBLY, FEB. 4, 1819, ILL. REV. LAWS (1829) 102; *Penny v. Little*, 4 Ill. 301 (1841); 2 JONES & ADDINGTON, ANNOTATED STATUTES (Ill. 1913) 1401.

slight exceptions,⁹⁷ the British statutes enacted prior to the settlement at Jamestown, where of a general nature and not local to England, are rules of decision, so far as consistent with the constitution and statutes of the state. Numerous ancient statutes are in force. Among them may be mentioned the statute of 4 Edward III, Chapter 7 (1464), modifying the English common law rule as to abatement of actions *ex delicto*, so as to give an action in favor of a personal representative for injury to personal property;⁹⁸ the statutes of 13 Edward I, Chapter 11 (1285), and 1 Richard II, Chapter 12 (1377), giving an action of debt against a sheriff for escape on *capias ad satisfaciendum*;⁹⁹ and the statute of 32 Henry VIII, Chapter 34 (1540), giving a right of action to the assignee of a reversion against the lessee.¹⁰⁰

Colorado, Indiana, and Wyoming follow the Illinois rule so closely as to include the same exceptions. As just stated, the Indiana statute dealing with the common law is a replica of the Illinois enactment.¹⁰¹ An odd situation in practice was solved in the case of *Swift v. Tousey*,¹⁰² by applying a statute of 21 Henry III (1237),¹⁰³ which provides that the 28th and 29th days of February count as but one day.

Wisconsin interprets the "common law"¹⁰⁴ as including such English statutes as were "part of the law of the colonies before the revolution and during the period of their dependency upon the laws and constitutions of Great Britain",¹⁰⁵ and recognizes the statute of 6 Anne, Chapter 3, Section 6 (1707), pro-

⁹⁷ 43 ELIZ. c. 6, § 2 (1601), 13 ELIZ. c. 8 (1566), and 37 HEN. VIII, c. 9 (1545). Colorado, Indiana, and Wyoming follow Illinois in expressly excepting the statutes just enumerated in their local statutes adopting acts of Parliament prior to 4 JAC. I (1606), as part of the common law.

⁹⁸ *Shedd v. Patterson*, 312 Ill. 371, 144 N. E. 5 (1924).

⁹⁹ *Plumleigh v. Cook*, 13 Ill. 669 (1852).

¹⁰⁰ *Fisher v. Deering*, 60 Ill. 114 (1871).

¹⁰¹ 1 IND. REV. STAT. (1852) 352, 1 IND. ANN. STAT. (Burns, 1926) ; *Sopher v. State*, 169 Ind. 177, 81 N. E. 913 (1907) ; *Alsman v. Walters*, 184 Ind. 565, 581, 111 N. E. 921, 923 (1915) ; *Ketelsen v. Stilz*, 184 Ind. 702, 111 N. E. 423 (1916).

¹⁰² 5 Ind. 196 (1854).

¹⁰³ The statute has no chapter number.

¹⁰⁴ WISCONSIN CONSTITUTION OF 1848, ART. XIV, § 13; 2 WIS. STAT. (1925) 2474.

¹⁰⁵ *Spaulding v. C. & N. W. Ry.*, 30 Wis. 110, 116 (1872).

viding that there shall be no action for fire accidentally begun, as part of the common law; but, unlike New York,¹⁰⁶ it considers the enlargement of that statute by the statute of 14 George III, Chapter 78, Section 86 (1774), as too close in point of time to the struggle for independence to be included in American common law.

The common law rule of Iowa is probably unique. In the case of *O'Ferrall v. Simplot*¹⁰⁷ it was decided that a local act declaring that "none of the statutes of Great Britain shall be considered as law", did not include English statutes enacted prior to "the union of the crown of England with that of Scotland" by act of Parliament, in 1707. In the same case it was held that the pre-Parliamentary Statute of Merton, 20 Henry III, Chapter 1 (1235), providing that "A woman shall recover damages in a writ of dower", is part of the common law of Iowa. In the case of *Gardner v. Cole*¹⁰⁸ the court changed the rule by stating that the statutes "antedating the settlement of this country are part of the unwritten law", which would mean statutes prior to 1607.¹⁰⁹ This change was not adhered to, for we find, in the case of *McClure v. Dee*,¹¹⁰ the statute of 3 & 4 William & Mary, Chapter 14 (1691), extending to devisees the liability of an heir for specialty debts of his ancestor, recognized as part of the local common law.

Minnesota, like Wisconsin, Oregon and a number of other jurisdictions, holds that American common law includes acts of Parliament amendatory of the common law of England, passed prior to the War of the Revolution. Accordingly it has been held that the statutes of 2 William & Mary, Chapter 5 (1690), allowing property distrained upon to be sold, and 11 George II, Chapter 19 (1728), covering the irregularity where landlords who are tenants-in-common make a joint instead of several distraint, to be part of the common law of Minnesota.¹¹¹

¹⁰⁶ *Lansing v. Stone*, 37 Barb. 15, 19 (N. Y. 1862); *Rogers v. Atl., Gulf & Pac. Refining Co.*, 213 N. Y. 246, 254, 107 N. E. 661 (1915).

¹⁰⁷ 4 Iowa 381 (1857).

¹⁰⁸ 21 Iowa 205 (1866).

¹⁰⁹ Cf. *Nelson v. McCrary*, 60 Ala. 301 (1877).

¹¹⁰ 115 Iowa 546, 88 N. W. 1093 (1902).

¹¹¹ *Dutcher v. Culver*, 24 Minn. 584, 620 (1877).

Colorado, once a civil law jurisdiction,¹¹² has adopted the Illinois common law statute,¹¹³ and, so late as the year 1907, applied the Statute of Limitations, respecting real actions, as part of the local law.¹¹⁴

Another jurisdiction which has copied the Illinois common law statute is Wyoming,¹¹⁵ which recognizes the widely prevalent statute of 32 Henry VIII, Chapter 35 (1540), conferring upon the grantee of a reversion the right to reënter for breach of condition in leases for life or years.¹¹⁶

The common law of Kansas is based, by statute, on the common law of England and all statutes and acts of Parliament made prior to the fourth year of the reign of James I, and not repugnant to nor inconsistent with local laws and institutions, except statutes for the punishment of crimes and misdemeanors.¹¹⁷ Hence the statute of 9 & 10 William III, Chapter 15 (1697), permitting arbitration of disputes concerning real property, was enacted too late to be part of the common law of Kansas,¹¹⁸ but the widely accepted statute of 2 & 3 Edward VI, Chapter 24 (1547), providing that, where a mortal wound is given in one county and death ensues in another, the latter county shall have jurisdiction, is recognized as part of the local common law.¹¹⁹

The laws of Spain prevailed in Missouri at the time of the transfer from France to the United States.¹²⁰ Shortly after the close of the War of 1812, however, the legal system was changed, and it was enacted that the common law of England and all stat-

¹¹² *Herr v. Johnson*, 11 Colc. 393, 18 Pac. 342 (1888).

¹¹³ *Chilcott v. Hart*, 23 Colo. 40, 45 Pac. 391 (1896).

¹¹⁴ 32 HEN. VIII, c. 2 (1540). See *Connell v. Clifford*, 39 Colo. 121, 124, 88 Pac. 850, 851 (1907).

¹¹⁵ WYO. COMP. STAT. ANN. (1920) § 4547.

¹¹⁶ *Investors' Guaranty Corp. v. Thomson*, 31 Wyo. 264, 225 Pac. 590, 32 A. L. R. 1071 (1924).

¹¹⁷ STAT. KAN. TER. (1855) 469. A later statute, Act of Oct. 31, 1868, continuing "the common law as modified by constitutional and statutory law, judicial decisions, and the conditions and wants of the people", has been held to make no basic change. *Clark v. Allaman*, 71 Kan. 206, 221, 80 Pac. 571, 576 (1905).

¹¹⁸ *Stigers v. Stigers*, 5 Kan. 652 (1865).

¹¹⁹ *State v. Criqui*, 105 Kan. 716, 185 Pac. 1063 (1919). The text of this useful statute is set forth in great detail.

¹²⁰ *Lindell v. McNair*, 4 Mo. 380 (1836); *Reaume v. Chambers*, 22 Mo. 36 (1855).

utes and acts of Parliament passed prior to the fourth year of the reign of James I, which were of a general nature, not local to that kingdom, and not repugnant to nor inconsistent with constitutional or statute laws, "shall be the rule of action and decision" in Missouri.¹²¹ This is substantially the Illinois rule, but for the slight exceptions previously noted.¹²² The workings of this statute are well illustrated in the case of *Baker v. Crandall*,¹²³ wherein it was held that the statutes of 4 Edward III, Chapter 7 (1330) and 31 Edward III, Chapter 11 (1357), providing for the survival of certain classes of actions of tort, are part of the law of Missouri.

The daughter state of Arkansas has a common law statute similar to the Missouri enactment, which traces back to a territorial act of the Missouri Territory, passed while Arkansas was still a part of Missouri.¹²⁴ The case of *State v. Ashley*¹²⁵ has been erroneously cited in one of the reporter systems as declaring a British statute, subsequent to 1607, to be part of the law of Arkansas. Very elaborate histories of the genesis of Arkansas law are to be found in the cases of *Cox v. Morrow*¹²⁶ and *Horsley v. Hilburn*.¹²⁷

The cession of Louisiana to Spain, in 1762, resulted in the introduction of much Spanish law into the vast region known in our schoolbooks as the Louisiana Purchase. This led to the *Siete Partidas*, of the year 1348, being translated into French and becoming an important element in the law of what finally became the state of Louisiana. It has been mistakenly asserted by some commentators that Louisiana has no common law. Not only has she adopted the common law doctrine of precedents, but she has also adopted the forms of indictment, method of trial, rules of evidence and other proceedings of that system in the prosecution

¹²¹ MO. TER. ACT OF JAN. 19, 1816, MO. REV. STAT. (1919) § 7049.

¹²² *Supra* note 97.

¹²³ 78 Mo. 584 (1883).

¹²⁴ ARK. DIG. STAT. (Crawford & Moses, 1921) § 1432; *Cox v. Morrow*, 14 Ark. 603, 613 (1854); *Horsley v. Hilburn*, 44 Ark. 458, 473 (1884).

¹²⁵ 1 Ark. 279, 305, 306, 310, 311 (1839).

¹²⁶ *Supra* note 124.

¹²⁷ *Ibid.*

of crimes, in accordance with the common law of England, as it existed in 1805.¹²⁸ By recognizing the statutes of 1 & 2 Phillip & Mary, Chapter 13, Sections 4, 5 (1554), and 2 & 3 Phillip & Mary, Chapter 10 (1555), concerning depositions in criminal matters taken before magistrates, it was demonstrated that Louisiana had fallen in line with the majority of American jurisdictions in placing a liberal construction on the phrase "common law".¹²⁹ So far as practicable, the state courts are exceedingly open-minded in their use of materials for the solution of jural problems. As an instance, the Louisiana Supreme Court, in 1839, decided that the repeal, in 1828, of the Spanish, Roman, and French laws, which were in force at the time of the cession to the United States, did not extend to the unwritten law, but only to Spanish, Roman, and French laws introductory of a new rule, and did not include those laws which were merely declaratory.¹³⁰

Alabama construes the word "laws", in her constitution of August 2, 1819,¹³¹ as including the common law as modified by "English statutes passed before the emigration of our ancestors".¹³² An earlier dictum in the case of *Garrett v. Lynch, Adm'r*,¹³³ to the effect that British statutes enacted prior to the Declaration of Independence are in force in Alabama, was superfluous, for that case turned on a local statute which happened to be copied from the statute of 8 & 9 William III, Chapter 11, Section 17 (1696). The legal system of Florida resembles those of the Pacific Coast states, for, while her constitution of January 11, 1839 (often cited in the reports as the Constitution of 1838) empowered the general assembly to declare what parts of the common law and what parts of the civil law should be in force,¹³⁴ she "carried on" under the act of November 6, 1829, ordaining

¹²⁸ *State v. McNeil*, 33 La. Ann. 1332 (1881); *State v. Wheat*, 111 La. 860, 871, 35 So. 955 (1903).

¹²⁹ *State v. McNeil*, *supra* note 128.

¹³⁰ *Reynolds v. Swain*, 13 La. 194 (1839).

¹³¹ 1 THORPE, *op. cit. supra* note 52, at 96, 113.

¹³² *Nelson v. McCrary*, 60 Ala. 301 (1877). Cf. ALA. CODE ANN. (1928) § 14.

¹³³ 44 Ala. 324, 327 (1870).

¹³⁴ FLORIDA CONSTITUTION (1839) ART. XVI, § 6; 2 THORPE, *op. cit. supra* note 52, at 680.

that the common law and statute law of England, of a general nature, enacted prior to the fourth day of July, 1776, should be in force.¹³⁵

There is a dim reminder of the philosopher Locke's scheme of a palatine government for Carolina in the early history of Tennessee law; for that system is derived from an enactment:

"by his excellency, the palatine, and the rest of the true and absolute lords proprietors of the province of Carolina, by and with the advice and consent of the members of the general assembly . . . for the northeast part of the province [later known as North Carolina] . . . that all [English and British] laws providing for the privileges of the people, and security of trade, as also, all statute laws made for the limitation of actions, . . . and for preventing immorality and fraud, . . . are and shall be in force here, although this province [of North Carolina, which at that time included Tennessee], or the plantations in general, are not therein named".¹³⁶

An interesting question of unusual scope arose in the early days of Tennessee statehood, in the case of *Ingram's Heirs v. Cocke*,¹³⁷ wherein the validity of judicial proceedings, under the aegis of the *de facto* state of Franklin, was determined. In the same volume in which the case of *Ingram v. Cocke* is published, there is a valuable reportorial note by Judge Cooper,¹³⁸ containing a list of British statutes which had been decided to be in force in Tennessee, ranging from the statute of 34 Edward III, Chapter 1 (1360), authorizing justices of the peace to bind persons "not of good fame" to security for good behaviour, to the statute of 5 George II, Chapter 7, Section 4 (1731), giving lien of judgment. Since the enactment of the state code of 1858, no statute of England, as such, is in force in Tennessee; but it has been held that this legislation did not abrogate the principles and rules of law that had been adopted from acts of Parliament, and for the sake

¹³⁵ 1 FLORIDA REV. STAT. (1920) § 71.

¹³⁶ 1 SCOTT, LAWS OF THE STATE OF TENNESSEE INCLUDING THOSE OF NORTH CAROLINA NOW IN FORCE IN THIS STATE (1821) 20, 22.

¹³⁷ 1 OVERTON 22' (Tenn. 1804).

¹³⁸ *Ibid.* 169 n.

of convenience such statutes continued to be discussed by their original designation.¹³⁹

The neighboring state of Kentucky, in her constitution of August 17, 1799,¹⁴⁰ adopted "all laws which, on the first day of June, one thousand and seven hundred and ninety-two, were in force in the State of Virginia".¹⁴¹ This, of course, included "the common law of England and all statutes or acts of Parliament made in aid of the common law prior to the fourth year of the reign of King James the First and which are of a general nature not local to that kingdom".¹⁴² A frequently misquoted law of Kentucky is the declaratory provision that "The decisions of the courts of Great Britain since the fourth day of July, one thousand seven hundred and seventy-six, shall not be of binding authority in the courts of Kentucky".¹⁴³ Plain and unmistakable as this language is, it has been repeatedly stated that no one is allowed to cite a post-independence English opinion in a Kentucky court of law. It is hardly necessary to remark that modern English decisions are given the same consideration in Kentucky that they receive in other American jurisdictions.

If Florida be classed as a Gulf state, Maine was the last Atlantic state to be admitted into the Union. Her constitution of December 6, 1819¹⁴⁴ continued "all laws in force in this State".¹⁴⁵ This system included the law of Massachusetts prior to the separation of the District of Maine from that commonwealth,¹⁴⁶ including British statutes,¹⁴⁷ and, in part, the usages and customs of the early inhabitants prior to the purchase by Massachusetts in 1677.¹⁴⁸

New Hampshire is another state which has inherited Massachusetts law. The union of settlements in New Hampshire with

¹³⁹ *State v. Miller*, 79 Tenn. 620 (1883).

¹⁴⁰ 3 THORPE, *op. cit. supra* note 52, at 1277, 1286.

¹⁴¹ ARTICLE VI, § 8.

¹⁴² *Supra* note 91.

¹⁴³ KY. STAT. (Carroll, 1922) § 2418.

¹⁴⁴ ARTICLE X, § 1.

¹⁴⁵ 3 THORPE, *op. cit. supra* note 52, at 1646, 1664.

¹⁴⁶ *Hovey v. Hobson*, 51 Me. 62, 66 (1863).

¹⁴⁷ *Weeks v. Hill*, 88 Me. 111, 33 Atl. 778 (1895).

¹⁴⁸ *Conant v. Jordan*, 107 Me. 227, 77 Atl. 938 (1910).

the province of Massachusetts, which continued until 1679, introduced a number of useful Massachusetts colonial ordinances subsequently recognized as part of the local common law.¹⁴⁹ Other recognized ingredients of the common law of New Hampshire include equity,¹⁵⁰ some provisions of the civil and ecclesiastical law,¹⁵¹ and English statutes.¹⁵² Among the British statutes recognized as part of the local common law may be mentioned the Statute of Additions, requiring that the place shall be stated in which the defendant was "conversant" (employed or engaged), in actions personal, appeals, and indictments;¹⁵³ the statute of 3 & 4 William & Mary, Chapter 14 (1691), binding lands in the hands of a devisee for the specialty debts of his testator;¹⁵⁴ the statute of 12 Charles II, Chapter 24, Section 8 (1660), authorizing fathers to make testamentary appointments of guardians for their minor children;¹⁵⁵ and the useful statute of 14 George II, Chapter 17, Section 1 (1740), empowering courts to give judgment for the defendant "as in the case of non-suit", where a case has been brought to issue, but the plaintiff fails or neglects to bring the issue to trial.¹⁵⁶

When our historians enumerate the countries whose allied or independent activities contributed towards the winning of our war for independence, they seldom include an associated independent state which closely coöperated with the thirteen original states, although it was not a member of the Confederation, and for some years was denied admission to the Union. Vermont, whose activity in the struggle for independence is a household word, declared her independence of New York and other objectors to her auton-

¹⁴⁹ *Nudd v. Hobbs*, 17 N. H. 524 (1845); *Concord Mfg. Co. v. Robertson*, 66 N. H. 1, 25 Atl. 718 (1889).

¹⁵⁰ *State v. Saunders*, 66 N. H. 39, 71, 25 Atl. 588 (1889); cf. *Goodman v. Carrol*, 205 Ala. 305, 87 So. 368 (1921); *Pennock's Estate*, 20 Pa. 268, 274 (1853).

¹⁵¹ *State v. Rollins*, 8 N. H. 550, 564 (1837).

¹⁵² *Ibid.*

¹⁵³ 1 HEN. V, c. 5 (1413). See *State v. Moore*, 14 N. H. 451 (1843).

¹⁵⁴ *Hall v. Martin*, 46 N. H. 337, 343, 352 (1865).

¹⁵⁵ *Morey v. Sohler*, 63 N. H. 507, 3 Atl. 636 (1885).

¹⁵⁶ *Wright v. Bartlett*, 45 N. H. 289 (1864). There is a fairly long list of British statutes decided to be in force in New Hampshire, in 2 HENING, NEW HAMPSHIRE DIGEST (1926) 1473.

omy, on July 8, 1777;¹⁵⁷ specifically as to New York and Great Britain, and impliedly as to Massachusetts and New Hampshire. A temporary statute, in 1779, established the "common law, as it is generally practised and understood, in the New England States".¹⁵⁸ A subsequent act, passed in 1782, recognized the statute laws and parts of laws of England passed before October 1, 1760, as part of the local system.¹⁵⁹ Some of the court decisions speak of October 1, 1760, as an arbitrary date; but it seems obvious that, whatever the motive, the legislative intention was to exclude all acts of Parliament bearing the name of George III. The judicial conception of common law is extensive, for it includes the legal system administered by the ecclesiastical courts of England.¹⁶⁰ Like some other American jurisdictions, Vermont includes applicable British statutes as part of her criminal law.¹⁶¹ As is the case in California and a number of other American jurisdictions, English acts of Parliament which are deemed unsuitable to local circumstances and usages, although adopted in many other jurisdictions, are not recognized as part of the common law. In accordance with this principle, which has been stated to be most emphatically involved in the cardinal maxim of all common law, *cessante ratione legis cessat et ipsa lex*, the Statute of Uses, which is studied in practically all American law schools, has been decided to be not a part of the law of the state.¹⁶² The modern statute affirming the "common law of England" as part of the local system¹⁶³ has made no change in the law.

The left wing of the Puritan revolutionists effected a mechanical and indiscriminate adoption of biblical texts as law in both Massachusetts and Connecticut, and, in so doing, overlooked many fundamental principles, such as the privilege against self-crimina-

¹⁵⁷ 6 THORPE, *op. cit. supra* note 52, at 3737.

¹⁵⁸ *Giddings v. Smith*, 15 Vt. 344, 352 (1844); *Clement v. Graham*, 78 Vt. 290, 300, 63 Atl. 146, 148 (1906); *Comstock's Adm'r v. Jacobs*, 89 Vt. 510, 96 Atl. 4 (1915).

¹⁵⁹ See cases cited *supra* note 158.

¹⁶⁰ *Le Barron v. Le Barron*, 35 Vt. 365 (1862). *Accord*: *Crump v. Morgan*, 38 N. C. 91, 98, 99 (1849).

¹⁶¹ *State v. White*, 2 Tyler 352 (Vt. 1803).

¹⁶² *Gorham v. Daniels*, 23 Vt. 600 (1851).

¹⁶³ VT. GEN. LAWS (1917) § 1479.

tion, and failed to observe such post-Pentateuchal texts as Proverbs 3:3 and Zechariah 7:9, extolling the quality of mercy. This *de facto* rejection of much common law was checked in Massachusetts by the Charter of William and Mary, of October 7, 1691, for that instrument authorized only such laws and ordinances as were not inconsistent with the laws of England;¹⁶⁴ a prominent feature of most colonial charters. The restoration of common law was so thorough that we find nineteenth-century Massachusetts decisions cited with respect in English, as well as in American, cases of the highest importance. The present-day rule concerning acts of Parliament closely resembles that of Pennsylvania. Primarily, useful statutes in force at the time of the first settlement are recognized as part of the common law, together with such subsequent acts as were intended to be extended to the American colonies;¹⁶⁵ and secondarily, a few acts have been adopted which are not included in the first class, but were adopted by the local courts because of their obvious utility, just as in early times Roman law was borrowed to fill gaps in the English law, and in modern times civil law solutions of jural problems are occasionally utilized in English and American courts.¹⁶⁶ Judicial usage has incorporated some colonial ordinances of Plymouth Colony into the common law of the state,¹⁶⁷ because of their obvious utility. This principle of utility rejects "All those laws of the parent country, whether rules of the common law, or early English statutes, which . . . were . . . not adapted to the circumstances of . . . [Massachusetts'] colonial condition . . ." ¹⁶⁸ The same principle has sanctioned the recognition of such useful statutes as 33 Henry VIII, Chapter 1 (1541),

¹⁶⁴ 3 THORPE, *op. cit. supra* note 52, at 1870, 1882.

¹⁶⁵ Commonwealth v. Knowlton, 2 Mass. 529, 534 (1807); Sackett v. Sackett, 25 Mass. 309, 320 (1829). *Accord*: Anonymous, 2 P. Wms. 75 (Eng. 1722).

¹⁶⁶ There is a partial list of the acts of Parliament in force in Massachusetts, in CROCKER, NOTES ON THE GENERAL STATUTES OF MASSACHUSETTS (Balde's ed. 1925) 32. The table of statutes in col. 15877 of MASSACHUSETTS DIGEST (1906) is a medley of provincial and imperial enactments.

¹⁶⁷ Watuppa Reservoir Co. v. City of Fall River, 154 Mass. 305, 28 N. E. 257 (1891).

¹⁶⁸ Commonwealth v. Hunt, 45 Mass. 112, 122 (1842). *Accord*: Fitch v. Brainerd, 2 Day 163, 189 (Conn. 1805); Guardians of the Poor v. Greene, 5 Binn. 554, 558 (Pa. 1813); Commonwealth v. Carlisle, Brightly 36, 38 (Pa. 1821); Lyons Corp. v. East India Co., 1 Moore P. C. 175 (Eng. 1836).

making cheating by false tokens an indictable offence;¹⁶⁹ 23 Henry VI, Chapter 9 (1444), prescribing the duties of a sheriff in the matter of taking bail;¹⁷⁰ and the post-settlement statute of 3 & 4 Anne, Chapter 9 (1704), anent negotiable instruments.¹⁷¹ A curious point of practice was solved by deciding a decree in alimony to be a debt within the meaning of the statute of 13 Elizabeth, Chapter 5 (1570), as to conveyances in fraud of creditors;¹⁷² and a post-independence act of Parliament, the statute of 46 George III, Chapter 37 (1806), declaring that a witness cannot legally refuse to answer a question relevant to the matter in issue, on the sole ground that such answer may establish or tend to establish that he is subject to a civil suit, was taken into consideration, not as an authority, "but as strictly a declaratory law entitled to weight", in the case of *Bull v. Loveland*.¹⁷³

The unhappy theocratic experiment in Connecticut, previously referred to, was terminated by the Charter of Charles II, in 1662, whereby the colonies of New Haven and Connecticut were united into one province with power to enact "wholesome, and reasonable Laws, Statutes, Ordinances . . . and Instructions, not Contrary to the Laws of this Realm of *England* . . .".¹⁷⁴ The judicial theory of recognized acts of Parliament is that of inheritance or adoption as rules of decision without the binding force of statutes.¹⁷⁵ While there is a dictum in the case of *Fitch v. Brainerd*¹⁷⁶ to the effect that British criminal statutes are not part of the local common law, the opinion in the case of *State v. Ward*¹⁷⁷ gives the text of the statute of 12 Anne, Chapter 7 (1713), and enforces its provisions where a person in the night-time entered a dwelling without breaking, for the purpose of committing a felony, but broke out in making his escape. There

¹⁶⁹ *Commonwealth v. Warren*, 6 Mass. 72 (1809).

¹⁷⁰ *Glezen v. Rood*, 43 Mass. 490 (1841).

¹⁷¹ *Pierce v. Talbo*, 213 Mass. 330, 100 N. E. 553 (1913).

¹⁷² *Purdon v. Blinn*, 192 Mass. 387, 78 N. E. 462 (1906).

¹⁷³ 27 Mass. 9, 13 (1830).

¹⁷⁴ 1 THORPE, *op. cit. supra* note 52, at 529, 533.

¹⁷⁵ *Fitch v. Brainerd*, *supra* note 168; *Baldwin v. Walker*, 21 Conn. 168, 181 (1851); *State v. Ward*, 43 Conn. 489 (1876).

¹⁷⁶ *Supra* note 175, at 189.

¹⁷⁷ *Supra* note 175.

are other statutes adopted subsequent to the acceptance of the charter, among which may be mentioned the familiar statute of 9 Anne, Chapter 20 (1710), concerning mandamus;¹⁷⁸ and the statute of 4 Anne, Chapter 16, Section 9 (1705), making the conveyance of a remainder or reversion effectual without attornment of the tenant.¹⁷⁹

Rhode Island is probably the first political entity in the western hemisphere which established the principle that the Church should not intermeddle with the State and the State should not interfere with the Church. The consequence has been a dearth of erratic and mischief-breeding legislation. An act of April 30, 1700 adopted the English statute as well as the common law, in all cases not otherwise provided for.¹⁸⁰ Another act, passed in 1749, made further provision on the subject.¹⁸¹ A subsequent act, in 1798, provided that "in all cases in which provision is not made, either at common law, or by the statutes aforesaid, the statute laws of England, which have been heretofore introduced into practice in this State, shall continue to be in force".¹⁸² The present day rule is that English statutes introduced before the Declaration of Independence, which have continued in force, are "deemed and taken as a part of the common law of the state".¹⁸³ An interesting history of the introduction of English statutes is contained in the opinion of Justice Dubois, in the case of *Tucker v. Denico*,¹⁸⁴ deciding that the Statute of Frauds and Perjuries, 29 Charles II, Chapter 3 (1677), is part of the common law of Rhode Island. Another interesting opinion appears in the case of *Reynolds v. Hennessy*,¹⁸⁵ deciding that damage to an interest in property by way of lien or security is a damage to personal estate within the meaning of the statute of 4 Edward II, Chapter 7 (1310), giving executors an action of trespass for a wrong done

¹⁷⁸ Strong's Case, Kirby 345, 351 (Conn. 1787).

¹⁷⁹ State v. Ward, *supra* note 175.

¹⁸⁰ Steere v. Field, 2 Mason 486 (C. C. R. I. 1822).

¹⁸¹ Exeter v. Warwick, 1 R. I. 63 (1834); Tucker v. Denico, 27 R. I. 239, 61 Atl. 642 (1905).

¹⁸² PUBLIC LAWS OF R. I. (1798) 78.

¹⁸³ R. I. GEN. LAWS (1923) § 6754.

¹⁸⁴ *Supra* note 181.

¹⁸⁵ 17 R. I. 169, 172, 23 Atl. 639 (1890).

to their testator. Criminal acts of Parliament are also included in the local law, as shown by the recent case of *State v. McMahon*,¹⁸⁶ which held that the statutes of 32 Henry VIII, Chapter 1, Sections 1, 2 (1540), and 30 George II, Chapter 24 (1756), creating the offence of cheating by false pretences, are in force in Rhode Island.¹⁸⁷

Despite the decision in *Mortimer v. New York Elevated R. R.*,¹⁸⁸ to the effect that rights which accrued during the Dutch rule were governed by the rules of the common law, because of the English title by discovery, there still remain traces of Roman Dutch law in New York, such as the civil law rules governing the title to the river beds of the Hudson and Mohawk Rivers, and the rule that the construction of Dutch grants be in accordance with Dutch law. The first constitution of New York, that of April 20, 1777, was drafted by John Jay. It ordained that such parts of the common law of England and of the statutes of England and Great Britain as were in effect April 19, 1775, should be and continue part of the law of the state.¹⁸⁹ By an act of December 10, 1828,¹⁹⁰ it was provided that:

"3. None of the statutes of England or Great Britain shall be considered as laws of this state; nor shall they be deemed to have any force or effect in this state, since the first of May in the year one thousand seven hundred and eighty-eight.

"4. No statutes passed by the government of the late colony of New York, shall be considered as law in this state."

This repealing act, at least the third section, has been emphasized by repeated reënactment.¹⁹¹ It sounds emphatic, but in the case of *Lansing v. Stone*¹⁹² the court held that the statute of 6 Anne, Chapter 31, Section 6 (1707), as reënacted and enlarged

¹⁸⁶ 140 Atl. 359 (R. I. 1928).

¹⁸⁷ A list of British statutes in force in the state will be found in the index of R. I. GEN. LAWS (1923).

¹⁸⁸ 57 Super. 244, 6 N. Y. Supp. 898 (1889).

¹⁸⁹ 5 THORPE, *op. cit. supra* note 52, at 2635.

¹⁹⁰ 1 EDMONDS, STATUTES AT LARGE (2d ed. 1872) 72.

¹⁹¹ STATUTORY CONSTRUCTION LAW, N. Y. Laws 1892, c. 677, § 30; GENERAL CONSTRUCTION LAW, N. Y. Laws 1909, c. 7.

¹⁹² 37 Barb. 15, 19 (N. Y. 1862).

by the statute of 14 George III, Chapter 78, Section 86 (1774), providing that no action should lie for damage caused by accidental fire, is part of the common law, for the stated reason that,

"no repealing act of our legislature, not even that passed December 10, 1828 (2 R. S. 779), is applicable to English or colonial statutes which were part of the common law of New York. This conclusion is supported by the opinions of Chancellors Walworth and Kent."

In the year 1915, the foregoing decision was approved and followed in *Rogers v. Atlantic, Gulf & Pacific Refining Co.*¹⁹³ There are many other New York decisions recognizing British statutes as part of the extant New York common law. Among them may be mentioned *Bogardus v. Trinity Church*,¹⁹⁴ citing the statutes of limitations of 32 Henry VIII, Chapter 2 (1540), and 21 James I, Chapter 16 (1623); *People ex rel. Brown v. Supervisors of Onondaga*,¹⁹⁵ following the statute of 11 Henry VII, Chapter 12 (1495), providing free writs and free counsel to poor people; and *Cahill Iron Works v. Pemberton*,¹⁹⁶ asserting the Statute of Frauds, 29 Charles II, Chapter 3 (1677), to be part of the common law of New York. The early case of *People v. Hennessy*¹⁹⁷ states that the statute of 21 Henry VIII, Chapter 7 (1529),¹⁹⁸ providing that servants embezzling goods should be punished as felons, is in force in New York, having been "reënacted in 1788, 1 R. L. 112"; and it was said by the court in the recent case of *Harmon v. Peats*¹⁹⁹ that an act of February 26, 1787²⁰⁰ reënacted such parts of the common law of England and of the statute laws of England and Great Britain and of the acts of the legislature of New York, as were in force April 19, 1775, and became a legislative declaration that the statutes therein mentioned had been extended to the colony

¹⁹³ 213 N. Y. 246, 254, 107 N. E. 661, 662 (1915), [1916C] ANN. CAS. 877.

¹⁹⁴ 4 Paige 178, 198 (N. Y. 1833).

¹⁹⁵ 4 N. Y. Crim. 102 (1886).

¹⁹⁶ 30 Abb. New Cas. 450, 27 N. Y. Supp. 927, 930 (1893).

¹⁹⁷ 15 Wend. 147, 157 (N. Y. 1836).

¹⁹⁸ This statute had been revived by the statute of 5 ELIZ. c. 10 (1563).

¹⁹⁹ 216 App. Div. 368, 214 N. Y. Supp. 353 (1926).

²⁰⁰ JONES & VARICK, LAWS OF THE STATE (1778-89) (1789) 88.

of New York by the Constitution of 1777, and were part of the common law. Seemingly the reenacting statute, which the writer has had no opportunity of consulting, was a law giving the statutes therein enumerated the elastic force and effect of rules of decision, and was not affected by the numerous repealing acts, only a few of which have been mentioned in this article.

The old rule in New Jersey was that British statutes passed prior to the surrender of the proprietary governments of the provinces of East Jersey and West Jersey to Queen Anne, on April 15, 1702, extended to united New Jersey.²⁰¹ Numerous British statutes continued in force until June 13, 1799,²⁰² at which time it was enacted "that from and after the passing of this act, no statute or act of the parliament of England or of Great Britain shall be in force or authority within this State, or be considered as a law thereof".²⁰³ This New Jersey repealing act seems to have been decisive,²⁰⁴ although the names of British statutes reappear like the original text in a palimpsest; as in the case of *Read v. Penna. R. R.*,²⁰⁵ where the court quotes the statute of 6 Anne, Chapter 31 (1707), providing that there shall be "no process against a person in whose house or chamber any fire shall accidentally appear", and then cites local statutes in which the provisions of said statute are said to have been incorporated.

None of the Swedish law in force during the original settlement of Pennsylvania survived the Dutch conquest.²⁰⁶ The intervening Roman Dutch law succumbed to the English conquest, with the exception of the principle of arbitration.²⁰⁷ Pennsylvania's legal system is derived from the Charter to William Penn of March 4, 1682, granted as compensation for a debt incurred by Oliver Cromwell's government to Penn's father, for expenses incurred in the conquest of Jamaica. The charter is unique in that the Statute of Quia Emptores (against sub-infeudation) was

²⁰¹ *State v. Mairs*, 1 N. J. L. 335 (1795).

²⁰² *In re Thompson*, 85 N. J. Eq. 221, 246, 96 Atl. 102, 113 (1915).

²⁰³ LAWS OF N. J. (1800) 434.

²⁰⁴ *In re Thompson*, *supra* note 202.

²⁰⁵ 44 N. J. L. 280, 282 (1882).

²⁰⁶ LOYD, *EARLY COURTS OF PENNSYLVANIA* (1910) 3.

²⁰⁷ *Ibid.* 15.

specially excepted.²⁰⁸ Judges and practitioners in those American jurisdictions whose legislatures impose upon local tribunals the duty of taking judicial notice of the statute and judiciary law of sister states—a class which seems to be increasing in number—will find their difficulties much lightened, in the field of the applicability of acts of parliament in Pennsylvania, by the convenient accessibility of the noteworthy Report of the Judges, of December 14, 1808.²⁰⁹ The late Chief Justice Mitchell (at that time an Associate Justice), with characteristic lucidity, estimates the weight of this report (which it is submitted is slightly less than that of a series of precedents, and much greater than that of an advisory opinion), in the judicial formula: "The presumption against a statute by its omission from the report is not, of course, so strong as the presumption in its favor by its affirmative inclusion; but it is still of great weight . . ."²¹⁰ The present Chief Justice of Pennsylvania, while an Associate Justice, in the case of *Kimberley's Estate (No. 3)*,²¹¹ having occasion to discuss and analyze the statute of 43 Elizabeth, Chapter 4 (1600), concerning charitable purposes, pointed out that the principles of the common law will not be restricted by the letter of an ancient statute which is partially declaratory; and, therefore, he held that this statute, although passed prior to the grant of the Charter of William Penn, is not part of the common law of Pennsylvania. The text of virtually every act of Parliament in force in the commonwealth is to be found in Judge Roberts' *British Statutes in Pennsylvania*. The acts of Parliament which have been held to be in force although not enumerated in the Judges' Report are very few. Among them may be mentioned 13 George II, Chapter 7 (1739), making the naturalization of foreigners a subject of judicial cognizance;²¹² 4 George II, Chapter 20, Sections 4 and 5 (1730), 21 James I, Chapter 16 (1623), and 10 & 11 William III, Chapter 14 (1698), dealing with common recoveries;²¹³ the

²⁰⁸ 5 THORPE, *op. cit. supra* note 52, at 3042.

²⁰⁹ 3 Binn. 595 (Pa. 1808).

²¹⁰ *Gardner v. Kiehl*, 182 Pa. 194, 200, 37 Atl. 829, 830 (1897).

²¹¹ 249 Pa. 483, 95 Atl. 86 (1915).

²¹² *Rump v. Commonwealth*, 30 Pa. 475 (1858).

²¹³ *Ransley v. Stott*, 26 Pa. 126, 130 (1856).

Statute of Limitations;²¹⁴ and the statute of 4 & 5 Anne, Chapter 16 (1705), concerning costs.²¹⁵ An indirect recognition of a post-independence British enactment, the act of 26 George III, Chapter 57, Section 38 (1786), is found in the case of *Clark and Sander-son*,²¹⁶ wherein a derivative principle was applied in admitting proof of the handwriting of a subscribing witness. Chief Justice Sharswood took a step further in the case of *Kane v. Commonwealth*,²¹⁷ by a direct citation of Fox's Bill, 32 George III, Chapter 60 (1792), as a declaratory statute settling the law that it is competent for the jury in all cases of indictment or information for libel to give a verdict of guilty or not guilty upon the whole matter put in issue.²¹⁸

Swedish and Dutch law seem to have left as little trace in Delaware as in Pennsylvania. In 1719²¹⁹ the colonial legislature, in a preamble to the twenty-second chapter of the legislation of that year, observed that "acts of Parliament have been adjudged not to extend to these plantations, except when they are particularly named in the body of such acts". It then took steps to supply deficiencies, chiefly by way of incorporation by implication, as well as, in a few instances, incorporating a few acts of Parliament by name. This action was followed a few years later²²⁰ by legislation conferring upon certain courts the powers of justices of the courts of King's Bench, Common Pleas, and Exchequer.²²¹ Article 25 of the constitution of September 20, 1776, continued "the common law of England, as well as so much of the statute law as has been heretofore adopted in practice in this state . . .".²²² It is surmised that the reception of the common law of England

²¹⁴ *Boehm v. Engle*, 1 Dallas 15 (Pa. 1766); *Morris v. Vanderen*, 1 Dallas 64 (Pa. 1782).

²¹⁵ *Black's Appeal*, 106 Pa. 344 (1884).

²¹⁶ 3 Binn. 192 (Pa. 1810).

²¹⁷ 7 W. N. C. 149 (Pa. 1879).

²¹⁸ Very useful references to Pennsylvania decisions on British statutes in Pennsylvania are to be found in 8 VALE, PENNSYLVANIA DIGEST (1911) 24962-24965; GOOD, INDEX OF PENNSYLVANIA STATUTES (2d ed. 1908) 27.

²¹⁹ 1 LAWS OF DEL. (1792) c. 22a, § 9.

²²⁰ Between 1726 and 1736. DEL. DIG. (1829) 101, 102.

²²¹ 1 LAWS OF DEL. (1797) c. LIVa, § 7.

²²² 1 LAWS OF DEL. (1797) Appendix, 89.

and applicable acts of Parliament in approval thereof took place on the acceptance of the charter by William Penn, which took effect October 28, 1708.²²³ There does not appear to be any publication giving lists of acts of Parliament which have been decided to be in force in Delaware. The useful statute of 32 Henry VIII, Chapter 32 (1540), giving joint tenants and tenants-in-common for life or years a right to an action of partition, has been decided to be in force,²²⁴ as has also the statute of 4 Anne, Chapter 16, Section 12 (1705), enabling a defendant in an action of debt or *scire facias sur judgment* to plead payment;²²⁵ but section 17 of the Statute of Frauds, 29 Charles II, Chapter 13 (1677), has been held not to be part of the local law,²²⁶ nor has the famous statute of 9 Anne, Chapter 20 (1710), concerning informations in the nature of quo warranto, been received or adopted in Delaware.²²⁷ The charter of June 20, 1632, to Lord Baltimore of Maryland and Avalon, granted the right to enact "Laws . . . consonant to Reason, and . . . not repugnant or contrary, but (so far as conveniently may be) agreeable to the Laws, Statutes, Customs, and Rights of this Our Kingdom of England".²²⁸ At first there seems to have been a failure on the part of the colonial courts to recognize that applicable inherited statutes were part of the local law;²²⁹ but not only are pre-settlement acts of Parliament part of the common law of Maryland, but also such post-settlement statutes as the act of 8 & 9 William III, Chapter 11 (1696), for better preventing frivolous suits,²³⁰ and the statute of 4 Anne, Chapter 16, Section 12 (1705), permitting the plea of payment to a writ of *scire facias*.²³¹ In Article III of the Declaration of Rights, the constitution of November 11, 1776, recognized "that the inhabitants of Maryland are

²²³ 1 THORPE, *op. cit. supra* note 52, at 557, 562.

²²⁴ *Ex parte Burgess*, 1 Del. Ch. 233, 240 (1822).

²²⁵ *Conner v. Pennington*, 1 Del. Ch. 177, 182 (1821).

²²⁶ *Allerdice v. Truss*, 2 Houst. 268, 273 (Del. 1860).

²²⁷ *Brooks v. Delaware*, 79 Atl. 790, 51 L. R. A. (N. S.) 1126 (1911).

²²⁸ 3 THORPE, *op. cit. supra* note 52, at 1669, 1680.

²²⁹ *Lloyd's Lessee v. Hemsley*, *supra* note 72.

²³⁰ *Wilmer v. Harris*, 5 Har. & J. 1 (Md. 1820).

²³¹ *McCullough v. Franklin Coal Co.*, 21 Md. 256 (1863).

entitled . . . to the benefit of such of the English statutes, as existed at the time of their first emigration, and . . . have been found applicable . . . and of such others as have since been made in England, or Great Britain, and have been introduced, used and practiced by the courts of law or equity . . . ”.²³² The Declarations of Rights of the subsequent constitutions of Maryland extend this provision to include such beneficial British statutes as existed on July 4, 1776.²³³ The District of Columbia inherits the law of Maryland which was in force on February 27, 1801.²³⁴

The North Carolina Law of 1715, Chapter 31, Section 7,²³⁵ extended to the province all laws providing for the privileges of the people and security of trade, for the limitation of actions, and for preventing immorality and fraud. In addition, all applicable canon and civil laws as administered in the ecclesiastical courts of England, wherever suited to local conditions, have been deemed to be part of the common law brought over by the first settlers.²³⁶ The accepted British statutes of South Carolina are those published by Joseph Keble, of Gray's Inn, with supplements down to November 15, 1709.²³⁷

The Supreme Court of Georgia, speaking through Lumpkin, J., indicated the relative effect which is to be given to English statutes in that state, as follows:

“The laws of Georgia may be thus graduated, with reference to their obligation or authority. 1st, The Constitution of the United States. 2d, Treaties entered into by the Federal Government before, or since, the adoption of the Constitution. 3d, Laws of the United States, made in pursuance of the Constitution, laws and form of government of the State. 4th, The Constitution of the State. 5th, The Statutes of the State. 6th, Provincial Acts that were in force

²³² 3 THORPE, *op. cit. supra* note 52, at 1686.

²³³ 3 THORPE, *op. cit. supra* note 52, at 1713, 1742, 1780.

²³⁴ Kendall v. U. S., 12 Pet. 524, 614 (U. S. 1838); D. C. CODE (1911) § 164. There is a list of British statutes referred to in local cases, in TORBERT, INDEX-DIGEST OF D. C. CASES (1908) 219.

²³⁵ *Supra* p. 216.

²³⁶ Crump v. Morgan, *supra* note 160.

²³⁷ BREVARD, PUBLIC STATUTE LAW OF SO. CAR. (1814) tit. 70. See *ibid.* 295 for a list of such statutes, ranging from 9 Hen. III to 9 Anne, inclusive.

and binding on the 14th day of May, 1776, so far as they are not contrary to the Constitution, laws and form of government of the State. 7th, The Common Law of England, and such of the Statute Laws as were usually in force before the revolution, with the foregoing limitation. It is the peculiar province of the Courts to ascertain and declare when any two of these several species of law conflict with each other; and then it follows, as a matter of course, that the *less* must yield to the greater. And on this point there is no dearth of precedents."²³⁸

Schley's *Digest of English Statutes*, published in 1826, is considered an exhaustive compilation of such British statutes as have been inherited or adopted in Georgia. In 1845 its contents were arranged with Georgia legislation, in the officially-authorized compilation, entitled Hotchkin's *State Law of Georgia*. It has been held that the Georgia Code does not affect the doctrine of such parts of the common law as have not been expressly repealed by statute.²³⁹

The subject matter of this article is frequently classed in the books as a subdivision of American common law. This may account, in part, for numerous instances where the tables of contents of law reports omit any mention of acts of Parliament discussed in legal opinions.

²³⁸ Flint River Steamship Co. v. Foster, 5 Ga. 194, 204, 205 (1848).

²³⁹ Higdon v. Bell, 25 Ga. App. 54, 102 S. E. 546 (1920).